APPEAL NO. 93237

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on January 19, 1993, before hearing officer Allen D. Rountree; the record was left open until March 4th for receipt of additional evidence. The appellant, carrier herein, appeals the hearing officer's determination that the respondent, hereinafter claimant, sustained an injury in the course and scope of his employment on April 30, 1992. The claimant contends that sufficient evidence supported the hearing officer's decision.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he was employed as a boilermaker helper for (employer), a job which entailed grinding metal and moving equipment. At the time of his injury, he had worked there approximately two weeks, although he said he had worked for the same employer on an earlier occasion. The claimant said that on (date of injury), about 2:30 a.m., he was grinding a metal plate under a low beam over the roof of a boiler. He said he felt a catch in his back, but could not straighten up because of the beam. He had to twist his body to get up, and said he felt a pinch that caused him to drop the grinder. He walked around and said the pain went away, although he said he told his foreman, Richard Knoll, about 15 minutes later that he had pulled something in his back.

The claimant said he worked the rest of his shift, which ended at 4:00 a.m., then went home. The next day, he said he was in pain and could not bend his body to get out of bed. He said his fiancee called work to say he could not come in. Because he was unable to get a doctor's appointment right away, he went to an emergency room on May 2nd, where he was examined, x-rayed, and given muscle relaxers. The history given was "c/o sharp pain R flank area, lifted heavy object 2 days prior no tingling to legs;" the diagnosis was lumbar strain. The claimant said he called work and told them about going to the emergency room and said he would be off work two days. Thereafter he returned to work, but he was sore and could not do anything heavy. He said he worked four days, then went to the employer's safety office and spoke with (Ms. F) about his back hurting. He finished his shift that day, but called in the next day saying he could not come in because of the pain. He has not worked for this employer or anyone else since that time.

Claimant did not receive further medical attention until September 1st when he went to see (Dr. W), an orthopedic surgeon. On October 6th Dr. W noted that claimant's MRI was normal but that he was still in pain and was unable to work. The doctor prescribed physical therapy, but claimant said the carrier would not pay for it. At the time of the hearing, the claimant said he had seen Dr. W twice. He said he had not seen a doctor earlier because he could not afford to; he said he had gone to the emergency room because

when he called employer's office the first time the person he talked to told him to go see a doctor.

The claimant said during the period between May and September he did not work. He said he contacted the Texas Workers' Compensation Commission during that time, and the evidence showed his notice of injury and claim (Form TWCC-41) was filed on June 3, 1992.

(Mr. K), who was working as claimant's foreman on (date of injury), testified that he instructs employees in job safety, including injury reporting, and he said claimant did not report an injury to him on that date. Mr. K said he believed he would have remembered claimant mentioning back pain because it was employer's procedure to report every injury, no matter how small. He said the claimant was off work a few days, and mentioned back pain upon his return, but he said he was not aware claimant had suffered a job-related injury until he received a call from (Mr. C), employer's head safety person. According to a May 11th internal company memorandum from Mr. C, on May 1st he received a call from the emergency room for workers' compensation verification on claimant because they said claimant had reported a job-related back injury. Mr. C's memo went on to state that investigation revealed that claimant did not report any injury to his foreman or to his fellow workers.

Ms. F, employer's safety inspector, said her job entails, among other things, making a written record of all injuries which are reported to her. She identified pages from the first aid log for the period March 5 - May 1, 1992, and said claimant's name was not listed thereon; on cross-examination, however, she acknowledged that she could not tell whether those were all the pages from that time period. She also kept her own personal notes, and said she believed she would have remembered talking to claimant because she knows him. She said she became aware that claimant was alleging a job-related injury when Mr. C asked her about it.

Signed, written statements which either corroborated or disputed claimant's testimony were offered into evidence by the claimant and the carrier.

The carrier maintains that the hearing officer erroneously determined that the claimant met his burden of proving that he sustained an injury in the course and scope of his employment, stating that the people he claimed he informed of his back injury "strongly testified" that those events did not occur, and that emergency room records contain inconsistent history.

As the hearing officer noted in his decision, this claim presented a disputed fact issue whose ultimate resolution centers around the claimant's credibility. As we have so often noted, the hearing officer is the sole judge of the relevance and materiality of the evidence

and of its weight and credibility. Article 8308-6.34(e). To the extent that this case involved conflicting testimony, it was the hearing officer's responsibility to resolve such conflicts. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). He was entitled to give more credence to the testimony of the claimant than that of the carrier's witnesses who, the hearing officer noted, appear to support the carrier's implication that failure to report an injury immediately is *prima facie* evidence that the injury did not occur.

We will overturn the decision of the hearing officer only if it is so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). Upon review of the record, we decline to do so in this case.

The decision and order of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge